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UNITED STATES BANKRUPTCY COURT

10 FOR THE DISTRICT OF OREGON

11 In re

12 THORNBURGH RESORT COMPANY,
LLC,

Debtor

No. 11-31897-tmb11

**LOYAL LAND, LLC'S MEMORANDUM
OF LAW IN AID OF RELEVANCY
OBJECTIONS**

15 Loyal Land, LLC ("Loyal") files this Memorandum of Law in Aid of Relevancy
16 Objections (the "Memo") in connection with the evidentiary hearing on Loyal's Motion for
17 Relief From Stay (the "Stay Motion") (Doc. No. 13). Based on the statements of Debtor's
18 counsel about the areas he intends to question Mr. Parker, and presumably Mr. DeLashmunt,
19 Loyal anticipates asserting relevancy objections to potentially large categories of the testimony
20 sought. Because those objections are based on underlying legal theories that have yet to be
21 briefed by either party to date, Loyal is submitting this memorandum of law in advance of the
22 next evidentiary hearing so that the objections may be more fully understood when they are
23 asserted.

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BACKGROUND

1. On or about March 11, 2011 ("Petition Date"), Thornburgh Resort Company, LLC (the "Debtor") filed a voluntary petition under chapter 11 of the Bankruptcy Code in Portland, Oregon commencing this Chapter 11 bankruptcy case.

2. On March 22, 2011, Loyal filed the Stay Motion. Evidentiary hearings on the Stay Motion have been held on May 18, 2011, May 31, June 1 and June 2. Two additional days of hearing are planned for June 8 and June 10.

3. On April 19, 2011, this Court directed Debtor to provide Loyal with a short and plain statement of the defenses as required by Federal Rule of Civil Procedure 8 by no later than April 22, 2011. Loyal received Debtor's statement on April 27, 2011. Debtor amended its statement twice, once on April 30, 2011 and again on May 7, 2011.

4. In its April 30, 2011 amendment, Debtor's counsel included the following defense: The party acquiring the November 2007 promissory note ("Note") made for the benefit of Sterling Savings Bank and its subsidiary, Action Mortgage ("Sterling") was the joint venture referred to in the Memorandum of Understanding (Loyal document #422) entered into by Terence Larson and Jeffrey Parker. The payor obligations under the Note, and the trust deed granted to secure those obligations, have been discharged.

5. In its May 7, 2011 amendment, Debtor's counsel included the following defense: Equity looks to the substance of a transaction rather than its form. COIH functioned as an agent of Parker, who was a joint venturer with debtor under the Investment Agreement. Parker through COIH attempted to purchase the Loan without including debtor in any arrangement involving Larsen/Loyal as funding investor in that purchase. By entering into the Memorandum of Understanding of March 1, 2011, Parker, with the assistance of COIH, usurped the TRC joint venture's opportunity to utilize the interest of Larsen and Loyal to avoid foreclosure and proceed with development. This constitutes an additional tort and breach of fiduciary duty by Parker and COIH.

6. In its Hearing Brief in Support of its Objection to Motion of Loyal Land, LLC for From Automatic Stay (Doc. No. 65) ("Debtor's Brief"), Debtor has asserted various claims against Loyal that it alleges will entitle Debtor to recoup sums in excess of amounts due Loyal. Under the heading "Debtor Has Claims Against COIH In Excess of Amounts

1 Owed Under the Loan" Debtor provides as follows:

2 Numerous breaches by PGI of its duty of good faith and fair dealing toward
 3 debtor under the IA occurred throughout the period following November 2007,
 4 together with breaches by PGI of its joint venture fiduciary duty to the project
 5 enterprise and to debtor as joint venturer with PGI. As a result of those breaches
 6 in contract and equity, debtor is entitled to ask the court to look to the substance
 7 of these transactions and not be distracted by their form, and find that Parker as
 8 investor with COIH, and Parker as investor with Larsen, acquired a debt that he
 9 himself owed to Sterling. The separate entities of PGI, Parker, and COIH being
 10 vehicles for advancing Jeff Parker's interest, formed in part for the purpose of
 11 stripping the joint venture created by the IA of the Property, to vest it in a
 12 different entity, all to the detriment of the joint venture he had with debtor.

10 Debtor's Brief, ¶ 63.

9 7. Neither the statements of defenses nor the language in Debtor's Brief provide any
 10 legal analysis of the theory for Debtor's argument. As such understanding the theory being
 11 asserted by Debtor has been difficult. This confusion was cleared up somewhat in the opening
 12 statement of Debtor's Counsel. Mr. Scharff stated:

13 Your Honor, that's the reason I said a moment ago moment ago that when the
 14 form of the transaction disguises the real substance, you look to substance. The
 15 substance was that Mr. Parker bought his own paper and sold it to Larsen as part
 16 of a larger deal. And given the history of what happened between Mr. Parker and
 17 the Debtor, it's our view that the appropriate assessment of that transaction is that
 18 we had the same person who is both the obligor and the obligee on the same
 19 instrument, all subject to the duties of the memorandum of understanding, this
 20 deal with Mr. Larsen. But, in effect, the debt should be deemed cancelled. Now,
 21 . . . Mr. Larsen may well have a subrogation claim of \$4 million, which is the
 22 money he put in against Mr. Parker, although he may well have waived that
 23 already. But, in fact, from the standpoint of the Debtor, we view that note as
 24 discharged. And once, of course, the note is discharged, the trust deed is
 25 discharged.
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ARGUMENT

A. A Court of Equity is Not Entitled to Ignore Applicable Law

8. Debtor's arguments suggest that as a court of equity this Court may use its
 22 equitable powers to simply disregard the form of a transaction. That, however, is not accurate.
 23 A court of equity is bound by existing principles of law. *See Nordling v. Cochran*, 98 Or. App.
 24 747, 750 (1989) (holding "[E]ven in equity, a court does not have the authority to ignore existing
 25 principles of law in favor of its view of the equities."); *Community Bank v. Jones*, 278 Or. 647,
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1 670 (1977) (observing that "equity follows the law" and that "in applying equitable defenses the
 2 court should be sensitive to the public policy goals expressed by this State's statutory law").

3 9. Although not clearly stated by Debtor, it appears that Debtor is attempting to argue
 4 that the corporate form should be disregarded in not just one instance, but several instances.
 5 Debtor's arguments appear to hinge on the actions of Mr. Jeff Parker. Unfortunately, Mr.
 6 Parker's actions are not a relevant inquiry.

7 10. There is no dispute that Debtor entered into an investment agreement on June 5,
 8 2007 with Parker Group Investments, LLC ("PGI"), as amended over time. The members of PGI
 9 are Jeff Parker and William Wilt. Similarly, it cannot be disputed that the purchaser of the
 10 Sterling Note was Central Oregon Investment Holdings, LLC ("COIH") and that, in a
 11 simultaneous closing, COIH assigned the note to Loyal. The sole member of COIH is Mr.
 12 Darren Welborn. The sole member of Loyal is Dr. Terry Larsen.

13 11. Despite these incontrovertible facts, Debtor has taken the position that Mr. Parker
 14 has somehow purchased his own note and therefore the note has been discharged. This argument
 15 fails for a number of reasons. First, Mr. Parker is not PGI. PGI is a legal entity and that legal
 16 entity cannot be disregarded. ORS 63.165 ("The debts, obligations and liabilities of a limited
 17 liability company, whether arising . . . in contract, tort or otherwise, are solely the debts,
 18 obligations and liabilities of the limited liability company."); *see also Lee v. Mitchell*, 953 P2d
 19 414, 425 (Or. App. 1998) ("a corporation is a legal entity separate from its shareholders,
 20 directors and officers"); *Peterson v. Employment Division*, 728 P2d 95, 96 (Or. App. 1986) ("The
 21 purpose of incorporating a business is to create a separate legal and financial entity.").¹

22 12. Second, even if it could be determined that Mr. Parker should be held liable for
 23 the acts of PGI, that is not the same as saying that Mr. Parker personally and not PGI is somehow
 24 solely responsible for the repayment of the note.

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 26 ¹ *See also Brown v. Margrande Compania*, 281 F. Supp. 1004 (D.C. Va. 1968) ("A corporation is an entity separate
 and apart from its stockholders and officers, and persons controlling it.")

1 13. Third, Mr. Parker is not a member of COIH. While Mr. Parker may have
 2 coordinated with COIH to facilitate COIH's purchase the note, nothing in that transaction gives
 3 rise to any basis for treating Mr. Parker and COIH as the same entity. There is no evidence of
 4 any wrongdoing by COIH.

5 14. Finally, Mr. Parker is not a member of Loyal. And, although Mr. Larsen and Mr.
 6 Parker have an understanding that contemplates the possibility of a future business relationship,
 7 the note is currently held by Loyal and not by any such entity that Mr. Larsen and Mr. Parker
 8 might establish. Furthermore, even if the note or the project is ultimately contributed to that
 9 entity, that entity is not the same as Mr. Parker and Mr. Parker cannot be said to own that note.

10 **B. The Legal Standard for Veil Piercing is Very High**

11 15. Under Oregon law, the corporate form is not lightly set aside. Limited liability for
 12 owners of corporations and LLC's is said to be "one of the major benefits of the corporate form
 13 of business organization." *Klokke Corp. v. Classic Exposition, Inc.*, 130 Or. App 399, 404, 912
 14 P2d 929, 932 (Or. Ct. App. 1996); *see also Amfac Foods v. Int'l Systems*, 294 Or. 94, 100, 654
 15 P2d 1092, 1097 (Or. 1982) ("Limited shareholder liability was extended to corporate
 16 shareholders to encourage risk capital investments"). Although the corporate form can be set
 17 aside in some circumstances, "[l]imited liability is the rule" and veil piercing "the exception."
 18 The Oregon Supreme Court has stressed that disregarding the corporate form is an "extraordinary
 19 remedy" of "last resort," available only "where there is no other adequate and available remedy
 20 to repair the plaintiff's injury." *Id.*; *see also City of Salem v. H.S.B.*, 302 Or. 648, 655, 733 P2d
 21 890, 894 (Or. 1987) ("we have been extremely reluctant to disregard the corporate form unless
 22 exceptional circumstances exist"); *Acrymed Inc. v. Convatec*, 317 F. Supp.2d 1204, 1214-15 (D.
 23 Or. 2004) (making same observation).

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1 16. A party asserting a veil piercing claim must establish the following three elements
 2 to impose liability on a shareholder for corporate wrongs: (1) the shareholder must have
 3 controlled the corporation; (2) the shareholder must have engaged in "improper conduct" in the
 4 exercise of control over the corporation; and (3) the shareholder's improper conduct must have
 5 caused plaintiff's inability to obtain an adequate remedy from the corporation. *Amfac Foods v.*
 6 *Int'l Systems*, 654 P2d 1092, 1101-02 (Or. 1982). Each of these elements must be established to
 7 pierce the corporate veil; proving one or two alone is insufficient. *Id.* at 1103; *Aero Planning*
 8 *Int'l Inc. v. Air Associates, Inc.*, 764 P2d 610, 612-13 (Or. Ct. App 1988); *Rice v. Oriental*
 9 *Fireworks Co.*, 707 P2d 1250, 1255 (Or. Ct. App 1985). Oregon case law regarding corporate
 10 piercing also applies to LLCs. *BDL Products, LTC v. Technical Plastics of Oregon, LLC*, 2006
 11 WL 3628062 * 3 (D. Or. Dec. 11, 2006) ("I conclude that the piercing doctrine may be applied to
 12 LLCs under the same circumstances in which it is applied to corporations.").

13 17. Debtor has not, and cannot, make a sufficient showing under this standard.
 14 Debtor's veil piercing analysis fails at various levels. For example, Debtor cannot show that the
 15 Loyal entity should be pierced to somehow hold purported liabilities of PGI. This is because
 16 (among other things) Loyal is neither owned by, nor controlled by, Jeff Parker or PGI. This fact
 17 alone is dispositive of Debtor's entire theory seeking to "consolidate" entities based on "equity."

18 **C. Questions Regarding Parker's Breaches of the Investment Agreement and Actions
 Relating to the Purchase of the Note Are Irrelevant**

19 18. Loyal does not dispute that relations between PGI and Debtor deteriorated and that
 20 both of those parties allege the other has committed breaches of their Investment Agreement.
 21 However, breaches of the Investment Agreement and the disputes between Mr. Parker, Debtor
 22 and Mr. DeLashmutt are, for the reasons set forth above, not relevant to any determination of
 23 whether Loyal is entitled to enforce the note. Accordingly, questions of Mr. Parker or Mr.
 24 DeLashmutt regarding those events are not relevant to this Court's determination of the Stay
 25 Motion.

CONCLUSION

For the foregoing reasons, Loyal respectfully submits that all questions relating to breaches of the Investment Agreement and the disputes between Mr. Parker, Debtor and Mr. DeLashmutt are not relevant and that all objections to testimony on that basis should be sustained.

DATED: June 6, 2011

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CERTIFICATE OF SERVICE

On June 6, 2011, I certify that a true and correct copy of **LOYAL LAND, LLC'S
MEMORANDUM OF LAW IN AID OF RELEVANCY OBJECTIONS** was sent to the party
listed below via U.S. Mail:

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The ECF Participants listed below were registered with the Court to receive electronic notification of all pleadings filed as of the date shown below:

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- Justin D. Leonard on behalf of Creditor Amy Mitchell, Trustee for Bankruptcy Estate of Robert L. and Lynn C. Keys, D. Or. Bk. Case No. 10-34294-tmb7 - jleonard@bjllp.com, jweisenbach@balljanik.com
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Dated this 6th day of June, 2011

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